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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Placer)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CHAD RICHARD MOWRY,

Defendant and Appellant.

C079863

(Super. Ct. Nos. 62134177,  
62100338)

The sole question in this appeal is easily stated: is defendant Chad Richard Mowry entitled to 116 additional days of presentence custody credit? Arriving at the answer is more difficult and bears out the California Supreme Court’s observation, “ ‘in what is surely an understatement, “[c]redit determination is not a simple matter.” ’ ” (*In re Marquez* (2003) 30 Cal.4th 14, 19, (*Marquez*), quoting *People v. Adrian* (1987) 191 Cal.App.3d 868, 874-875.) Determining whether defendant in this case is entitled to the additional credits involves parsing days he spent on electronic monitoring while he had two pending cases. The first case involved a violation of probation in Placer County case

No. 62100338, to which we refer as the VOP case. The second case involved a residential burglary (Pen. Code, § 459)<sup>1</sup> in Placer County case No. 62134177, to which we refer as the burglary case.

Defendant argues the trial court erroneously allocated the presentence custody credits at issue solely to his VOP case when he “actually needed” the credits for the prison sentence to be allocated to his burglary case. The People concede the issue. We reject defendant’s argument and the People’s concession. Defendant has not met his burden to show his presentence custody in the form of electronic monitoring was solely due to the charges in his burglary case. In sentencing defendant in his VOP case, the trial court gave him the benefit of a favorable negotiated plea deal that resulted in a “time served” sentence where the custody credits at issue were used. The trial court did not err in refusing to award duplicative credits in defendant’s burglary case.

Accordingly, we affirm the judgment in the burglary case. With regard to the VOP case, we modify the judgment to award defendant an additional 18 days of presentence credit for a period of electronic monitoring that was omitted. As modified, the judgment in the VOP case is affirmed.

#### BACKGROUND

Defendant’s exclusive focus on presentence custody credits obviates the need for a detailed recitation of the underlying facts.

#### *The VOP Case*

The VOP case arose out of defendant’s 2011 felony convictions of burglary and seizure of property without authority. The trial court granted defendant probation for a term of five years. Defendant did not perform well on probation. A petition for

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

revocation of probation was filed in September 9, 2014, based on an allegation defendant had engaged in disorderly conduct by being drunk in public in violation of section 647, subdivision (f), on August 6, 2014. The petition would later be amended to include two drug offenses and the 2014 violation of section 459 that would be charged in the burglary case.

### ***The Burglary Case***

The burglary case arose out of defendant's first degree burglary of a residence on September 19, 2014. Defendant was also charged with a prior strike under California's three strikes law. (§ 1170.12.) The allegations in the burglary case were included among the various bases for the petition in the VOP case.

### ***Negotiated Pleas and Sentencing***

Both the VOP and burglary cases were resolved by negotiated pleas that were accepted in the same proceeding. In the burglary case, defendant pleaded no contest to the burglary and admitted the prior strike allegation. In pertinent part, the trial court stated the terms of the plea as follows: "[M]y understanding is that you would plead either guilty or no contest to Count One, which is first-degree residential burglary . . . . [¶] Also, that you would admit that you have a prior conviction of a strike; that you would receive the middle term, which is four years. And because of the prior strike, that would be doubled to eight years." Consistent with the agreement, the trial court sentenced defendant to serve an aggregate term of eight years for the burglary. In the burglary case, the trial court awarded defendant 272 days of custody credit.

In the VOP case, defendant admitted violating the terms of his probation. On the record, the trial court stated the plea bargain in pertinent part as follows: "In the probation case, you would admit that you violated probation in that case. Probation would be terminated, and there would be no additional time added to your prison

sentence for that . . . .” Consistent with this understanding, probation was terminated and there was no additional sentence. In sentencing defendant to time already served, the trial court stated defendant had 419 days of custody credit in the VOP case.

The trial court denied defendant’s request to award him custody credit in the burglary case for the time he spent on electronic monitoring program release. In so ruling, the trial noted that for the period of credits claimed by defendant as applying to the burglary case he also had the VOP case pending. The trial court sorted the credits as follows:

“November 6, was the date that he was arraigned in [the burglary case]. So let’s see. So pre-trial home confinement he had on November 6, 2014. [¶] And the only case number I have is [the VOP case]. [¶] He was placed on pre-trial confinement on the same day of his initial arraignment in [the burglary case]. So I look at the Minute Order from November 6, in [the burglary case], and it says: [¶] *The People request bail be set in both cases.* The motion is denied. Defendant is currently on [electronic monitoring] with Probation. Defendant is to remain in his current program. [¶] So I can see how probation would think from their perspective that he was only on [electronic monitoring] on [the VOP case], because that’s what the Order says.” (Italics added.)

The trial court proceeded to consider whether the electronic monitoring applied to both cases or only the VOP case, reasoning as follows:

“It’s says OR release. It was on the 8:30 calendar. It wasn’t the in-custody arraignment calendar. So, apparently, what happened [was] the People had filed a new case, and it was heard in the morning in Department Thirteen. And he was on [electronic monitoring] in the prior case. People were requesting that he be remanded and bail be set on both cases.

“Judge Curry said, no, he will remain on [electronic monitoring], because he had previously been set. But he raised the level. He raised it to [electronic monitoring], w[h]ere it was previously on Supervised OR. So he was just on OR.

“I do have to say that when you look at the calendar though, *the Minute Order* says [*electronic monitoring*] on both *Minute Orders*.” (Italics added.)

The trial court awarded the custody credit for electronic monitoring solely on the VOP case.

Defendant filed a timely notice of appeal.

## DISCUSSION

Defendant contends he is entitled to an additional 116 days of presentence custody credit in the burglary case, comprised of (1) an 18-day period for time spent on electronic monitoring from November 6, 2014 to November 24, 2014, for which neither the probation department nor the court gave him credit and (2) a 98-day period for time spent on electronic monitoring from November 14, 2014 to March 1, 2015 that the probation department and court allocated solely to the VOP case. We conclude defendant is not entitled to additional presentence credits in the burglary case because the electronic monitoring period was properly applied to the VOP case. With regard to the 18-day period of electronic monitoring, we conclude the judgment in the VOP case must be modified to award defendant an additional 18 days of presentence credit.

### A.

#### ***Presentence Custody Credits when a Defendant Faces Charges in Two Cases***

During the time relevant to this case, subdivision (a) of section 2900.5 has provided that “[i]n all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a

jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019 . . . shall be credited upon his or her term of imprisonment.” (Compare § 2900.5, subd. (a), with Stats. 2011, ch. 15, § 466, eff. April 4, 2011.) “For purposes of section 2900.5, the phrase ‘term of imprisonment’ ‘includes any period of imprisonment imposed as a condition of probation.’ ” (*People v. Santa Ana* (2016) 247 Cal.App.4th 1123, 1130.)

Subdivision (b) of section 2900.5 provides that “credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.” In *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*), the California Supreme Court examined the operation of section 2900.5 to hold that “where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a ‘but for’ cause of the earlier restraint. Accordingly, when one seeks credit upon a criminal sentence for presentence time already served *and credited on a parole or probation revocation term, he [or she] cannot prevail simply by demonstrating that the misconduct which led to his [or her] conviction and sentence was ‘a’ basis for the revocation matter as well.*” (*Id.* at pp. 1193-1194, italics added.) In so holding, the *Bruner* court explained that “[s]ection 2900.5 is not intended to bestow the windfall of duplicative credits against all terms or sentences that are separately imposed in multiple proceedings.” (*Id.* at p. 1191.)

The *Bruner* court also “note[d] that defendant’s burden, while onerous, is not necessarily impossible. For example, in *People v. Williams* (1992) 10 Cal.App.4th 827

(*Williams*), the defendant was arrested for kidnapping and sexually assaulting a minor. His probation in an earlier matter was revoked on two grounds, failure to ‘obey all laws’ and ‘new charges.’ He was also charged with multiple sex offenses in the new case, but he subsequently entered a negotiated plea to one count only. The Court of Appeal concluded he was entitled to credit against his sentence for time spent in custody on the probation revocation because this custody arose from the identical conduct that led to the criminal sentence. First, the court reasoned, the record of the probation revocation disclosed no basis for a conclusion that the ‘obey all laws’ violation related to anything except the kidnapping-assault case. Second, the court concluded, the mere dismissal of certain counts in the criminal proceeding, all of which counts stemmed from the same criminal episode, did not mean that the revocation was based on conduct different from that leading to the criminal sentence. (*Id.* at pp. 832-834.)” (*Bruner, supra*, 9 Cal.4th at p. 1193, fn. 10.)

The issue of whether a defendant is entitled to additional presentence custody credits under section 2900.5 presents a question of statutory construction subject to the de novo standard of review. (*People v. Anaya* (2007) 158 Cal.App.4th 608, 611.) Even so, defendant, as the party seeking additional custody credit, has the burden to demonstrate he is entitled to such credit. (See *People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.)

## **B.**

### ***Defendant Has Not Shown He Would Have Been Free of Custody if Only the Burglary Case Had Been Pending***

The trial court did not give defendant credit for actual time for the 18 days of electronic monitoring from November 6, 2014 to November 24, 2014. The record establishes the defendant was subject to electronic monitoring from November 6, 2014 to

March 1, 2015. However, the probation officer's report – which the trial court adopted – credits defendant for electronic monitoring only starting on November 24, 2014.

Consequently, defendant is entitled to have his abstract of judgment reflect the additional 18 days of credit. This raises the question of which abstract should reflect the additional credit: the VOP case or the burglary case?

We conclude the period of electronic monitoring, from November 6, 2014 to March 2, 2015 should be credited to one case: defendant's VOP case. As the trial court's disposition of the VOP case shows, defendant's sentence was for time already served. As the prosecutor's opposition to dual credits for the VOP and burglary cases indicated, defendant benefitted from a very favorable disposition for his violation of probation. This disposition required defendant to serve only 277 days of custody for his 2011 conviction of a serious felony, namely, first degree residential burglary. (See §§ 667, subd. (a)(4) & 1192.7, subd. (c)(18).)

We reject defendant's claim the plea agreement required that "the probation case be terminated with no time imposed." In essence, defendant's assertion is based on the erroneous assumption he received no punishment at all for his plea to the 2011 serious felony. This assertion is wrong. Defendant *was sentenced* for his VOP case, albeit on very favorable terms, to actual time served prior to his plea. Defendant could have been sentenced to serve six years in state prison for his 2011 first degree residential burglary. (§ 461, subd. (a).) The trial court properly applied the credit for time spent on electronic monitoring to defendant's VOP case.

Because the electronic monitoring credit was properly applied to defendant's VOP case, he was not entitled to the windfall of duplicative credit for his 2014 burglary. Defendant cannot establish his burglary case was the "but for" cause of his pretrial electronic monitoring. To the contrary, the trial court observed he was granted electronic



monitoring in both the VOP and burglary cases. And the conduct charged in the VOP case was based on the 2011 burglary, allegations of drug abuse, and disorderly conduct. The burglary case was based on a 2014 burglary. Thus, this is not a case like *People v. Williams* (1992) 10 Cal.App.4th 877 in which the custody in both cases arose out of the same conduct. (*Bruner, supra*, 9 Cal.4th at p. 1193, fn. 10; *Williams, supra*, 10 Cal.App.4th at p. 834.) Moreover, there was never a time in which defendant faced charges in the burglary case but not the VOP case. The VOP petition was filed before the burglary case and sentencing on both occurred at the same hearing.

We reject defendant's reliance on *Marquez, supra*, 30 Cal.4th 14. *Marquez* involved a defendant convicted of burglary in both Monterey County and Santa Cruz County. (*Id.* at p. 17.) Defendant was taken into custody in Santa Cruz County on burglary allegations. (*Ibid.*) Shortly thereafter, Monterey County requested Santa Cruz County to hold him with respect to a second unrelated burglary. (*Ibid.*) Defendant was convicted of burglary in both the Santa Cruz case and the Monterey case. (*Id.* at p. 18.) The Santa Cruz County conviction was eventually reversed and *dismissed*, and the defendant sought credit in the Monterey case for the time spent in custody after Monterey County requested Santa Cruz County to hold him. (*Ibid.*) He argued that once the Santa Cruz County conviction was reversed and dismissed, his confinement for this time period was attributable to the Monterey case. (*Id.* at p. 19.) The California Supreme Court agreed with the defendant, reasoning that "because his custody after placement of the Monterey County hold was attributable to both his Santa Cruz and Monterey County cases, dismissal of the Santa Cruz County charges still left him with the Monterey County sentence against which credit for all of his custody from placement of the Monterey County hold until imposition of sentence could be applied." (*Id.* at p. 21, italics omitted.)

The key difference is that *Marquez, supra*, 30 Cal. 4th 14 involved *dismissal* – essentially freeing up the custody credits for use in the other case for which the defendant was held – while this case involved defendant’s *sentencing* for the case for which credits were used. Thus, the custody credits in defendant’s VOP case were never freed up for application to his burglary case. Accordingly, the trial court properly applied the electronic monitoring credits solely to defendant’s VOP case.

#### DISPOSITION

The judgment in Placer County case No. 62134177 (defendant’s burglary case) is affirmed. The judgment in Placer County case No. 62100338 (defendant’s VOP case) is modified to award defendant an additional 18 days of presentence custody credit. As modified, the judgment in Placer County case No. 62100338 is affirmed. The trial court is directed to prepare an amended abstract of judgment in Placer County case No. 62100338 and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

\_\_\_\_\_/s/  
HOCH, J.

We concur:

\_\_\_\_\_/s/  
BLEASE, Acting P. J.

\_\_\_\_\_/s/  
DUARTE, J.